**Northside Center for Child Development, Inc.** ***and*** **Brotherhood of Security Personnel Officers and Guards.** Case 2–CA–24030

January 14, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Exceptions to the judge's decision in this case require the Board to determine whether the Respondent failed to meet its bargaining obligation when it changed, without bargaining, the past practice of providing guns to its guards and requiring the guards to carry the guns while on duty.[1] The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The General Counsel excepts to the judge's finding that the Respondent's unilateral decision to remove the guns from the guards' possession did not result in a material, substantial, and significant change. The General Counsel also excepts to the judge's failure to find that the decision to disarm the guards involved a mandatory subject of bargaining. We find merit in the General Counsel's exceptions.

The question of whether a security guard will carry a weapon is a mandatory subject of bargaining. This subject is ''plainly germane to the 'working environment''' and ''not among those 'managerial decisions, which lie at the core of entrepreneurial control.'''[2] In addition, the question of whether the guards will carry guns is a very substantial and significant one. It can affect the safety, and indeed the life, of the guard involved. Questions concerning the safety and the lives of unit employees are not insignificant matters. Accordingly, we find that the Respondent has violated the Act as alleged.

Our dissenting colleague argues that the Respondent's change had no effect on the guards' duties or safety. We disagree. If the term ''duties'' is narrowly defined to mean job functions, we would agree that the employees in this case perform precisely the same functions as they did before. However, the *requirements* of the job have clearly changed. The record establishes that the ''special requirement'' section of the job description for guards requires them to carry guns. The Respondent's change prohibited them from doing so.

In addition, one of the incidents which triggered the unilateral change in this case involved an altercation in which a client reportedly brandished a knife in the presence of a guard. Although the Respondent was concerned about the safety of the clients and therefore acted to take away guns from the guards, the Union, assessing the same incident, would legitimately be concerned about the safety of the guards and would want to retain the guns of the guards.

Our dissenting colleague observes that there is no record evidence that the guards in this case were in fact safer when they were armed. However, in 8(a)(5) cases, the Board does not seek to make an assessment as to whether a given change would make the workplace ''safer'' or otherwise ''better.'' The issue in such cases is whether the change is of legitimate concern to the union as the representative of employees, such that the union would be entitled to bargain about the matter on behalf of the employees. For the reasons indicated above, we believe that the subject of gun possession is such a matter of concern.

We note that our holding in no way disregards the Respondent's concerns over the safety of its clients. All that the Respondent was required to do was give the Union notice and an opportunity to bargain over the proposed removal of the guns. If, during good-faith bargaining, the Union was unable to suggest any safeguards for the guards' continued possession of the guns that satisfied the Respondent and the parties reached impasse, the Respondent's subsequent removal of the guns would in no way violate the Act. Furthermore, the Board takes account of any emergency circumstances in determining how extended bargaining need be before the parties can be deemed at impasse.

In the present case, however, the incidents which the Respondent asserts prompted it to demand removal of the guns allegedly occurred in November 1988, May 1989, and November 22, 1989. The Respondent did not make its demand to the guards to return the guns until December 19, 1989. Obviously, even under the Respondent's assessment of the urgency of the need to take action, there was ample time to notify the Union and give it a chance to respond to the proposed course of action.

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 3 in Administrative Law Judge Morris' decision:

''3. By unilaterally discontinuing the practice of providing guards with guns and requiring the guards to carry guns while on duty, the Respondent has failed and refused to bargain collectively with the representative of its employees in violation of Section 8(a)(5) and (1) of the Act.''

[1] On August 7, 1991, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] *Johnson-Bateman Co.*, 295 NLRB 180, 182 (1989), quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488 at 489 (1979).

ORDER

The National Labor Relations Board orders that the Respondent, Northside Center for Child Development, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with Brotherhood of Security Personnel Officers and Guards, as the exclusive bargaining representative of its employees in the appropriate unit by changing the terms and conditions of employment without bargaining collectively with the Union in accordance with Section 8(a)(5) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind, on request, the unilateral change in the practice of providing guards with guns and requiring that the guards carry the guns while on duty.

(b) Post at its New York, New York facility copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER DEVANEY, dissenting.

I disagree with my colleagues' conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a new policy prohibiting its security guards from carrying guns, without providing the Union with advance notice of and an opportunity to bargain about the change. More specifically, I disagree with my colleagues' finding, contrary to the judge, that this unilateral change in policy constituted a material, substantial, and significant change in the terms and conditions of employment of the Respondent's two security guards, so as to require the Respondent to bargain about this change.

My colleagues and I agree that an employer is obligated to bargain about a change in terms and conditions of employment when it is a ''material, substantial, and significant'' change.[1] We differ, however, on the result reached in applying that standard to the facts in this case.

I agree with and adopt, for the most part, the judge's analysis leading to his conclusion that the change in policy did not constitute a material, substantial, and significant change in the terms and conditions of the guards' employment.[2] In doing so, I note particularly that there is no evidence that the Respondent's unilateral change in policy to now prohibit its security guards from carrying guns had any actual effect on the guards' wages, duties,[3] or safety.[4]

Thus, my colleagues' speculation about the new policy's possible adverse effect on the guards' safety is just that—speculation. In the absence of any record evidence on which to base a finding that the guards' safety was in any way endangered by the Respondent's

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] See, e.g., *Murphy Oil USA*, 286 NLRB 1039, 1041 (1987); *Peerless Food Products*, 236 NLRB 161 (1977).

[2] I do not, however, rely on the judge's discussion (in sec. II,B,3 of his decision) of the Respondent's *reasons* for unilaterally changing its policy. The lawfulness of this unilateral change is determined by whether it was a material, substantial, and significant one, not whether the Respondent had a good business reason for wanting to make it.

[3] There are, in fact, no exceptions to the judge's express findings (in sec. II,B,2 and 3 of his decision, respectively) that ''[t]here is no indication in the record that the duties of Clark and Coxall changed in any respect after their guns were removed'' and that ''[t]here has been no showing that the duties of the two employees were changed in any way.'' In his brief in support of exceptions, the General Counsel expressly notes these findings, and raises no factual challenge to them.

However, in taking a tack not taken by the General Counsel, my colleagues contend that the new prohibition against; carrying guns *has* had an effect on the duties of the security guards, referring to the ''Special Requirements'' section of Respondent's job description for security guards, which required them to be armed while on duty. In fact, there is no mention of carrying a gun in the four specific duties set forth in the ''Duties'' section of the job description (i.e., checking credentials; logging in visitors; checking stairways; and performing other assignments as directed). Thus, the job description relied on by my colleagues does not set forth any security guard duties requiring the carrying of a gun, and, as the judge found without exception, the record does not show that any security guard duties have been changed as a result of not carrying a gun.

[4] Indeed, the judge stated (in sec. II,B,2 of his decision) that the General Counsel conceded in his brief to the judge that there is no evidence in the record that the guards in this case were in fact safer for being armed. And the General Counsel does not except to that statement. Nevertheless, although the record does not say, one could speculate that the Respondent might have initially implemented its former policy requiring security guards to carry guns out of concern for the safety not only of the Respondent's clients, staff, and visitors, but also of the security guards themselves. But I note that in the only instance in the record in which one of the security guards even allegedly displayed his gun, in response to a visitor allegedly displaying a knife, the Respondent's immediate and only concern was for the safety of its *clients*, not the guards. Indeed, it was this incident which led directly to the Respondent's change in policy *prohibiting* guards from carrying guns. In any event, the record does not show that the Respondent's new policy has had any effect on the guards' safety.

change in policy, I simply decline to join my colleagues.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain collectively with Brotherhood of Security Personnel Officers and Guards, as the exclusive bargaining representative of our employees in the appropriate unit by changing the terms and conditions of employment without bargaining collectively with the Union in accordance with Section 8(a)(5) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind, on request, the unilateral change in the practice of providing guards with guns and requiring that the guards carry the guns while on duty.

NORTHSIDE CENTER FOR CHILD DEVELOPMENT, INC.

*Leah Z. Jaffe, Esq.*, for the General Counsel.
*Richard Schoolman, Esq. (Eikenberry, Futterman, & Schoolman)*, of New York, New York, for the Respondent.
*Haywood Banks, Esq.*, of Flushing, New York, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City on November 26, 1990. Upon a charge filed on December 22, 1989,[1] a complaint was issued on March 26, 1990, alleging that Northside Center for Child Development, Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by unilaterally removing guns from its two security guards. Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by the Respondent.

On the entire record of the case including my observation of the demeanor of the witnesses, I make the following

[1] All dates refer to 1989 unless otherwise specified.

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a New York corporation with an office and place of business in New York City, has been engaged in the operation of a mental health center, providing medical care to the public. It annually derives gross revenues in excess of $250,000 and receives at its facility goods and services valued in excess of $10,000 directly from points located outside the State of New York. Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act. In addition, it has been admitted, and I find, that Brotherhood of Security Personnel Officers and Guards (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICE

##### A. *The Facts*

The Respondent is a nonprofit agency which provides therapeutic and educational remedial services to families and children in the Harlem and East Harlem areas of New York City. In addition, Respondent provides an early childhood program which services preschool children with learning disabilities. Respondent is a tenant of Shomberg Plaza, which is a housing development located at 1301 Fifth Avenue. To gain access to Respondent's facility one must walk through Shomberg Plaza's security area where Shomberg Plaza security guards are posted.

On July 20, 1989, the Board certified the Union as the exclusive bargaining agent in an appropriate bargaining unit of all full-time and regular part-time security guards employed by Respondent at its 1301 Fifth Avenue facility. During 1989 Respondent employed two security guards, Bernard Clark and Compton Levi-Coxall. Clark had been employed by Respondent as a security guard since September 1986. In 1988 he started to carry a weapon. Coxall was employed by Respondent since 1983. The record does not indicate when he began carrying a weapon, however, he did carry a weapon during 1989.

Khadijah Abdullah, Respondent's director of operations and personnel, testified that in May 1989 she had an altercation with Coxall in which he said that he was angry and that if she said anything that made him angry ''he would do something to my face.'' In addition, Abdullah testified concerning an incident in which Coxall was involved on November 22, 1989. The mother of one of Respondent's clients was involved in an altercation with Coxall and she alleged that Coxall pulled a gun on her. Abdullah testified that Coxall told her that the client's mother drew a knife, at which time he displayed his gun. Lisa Paisley-Cleveland, deputy director of Respondent, testified that after the incident she and the executive director met. She credibly testified, ''we were extremely concerned about the welfare of our clients following this incident. We didn't feel we had any other recourse but to take back the guns.'' On December 19 Respondent requested that Clark and Coxall return their weapons. Clark turned in his weapon on December 19 and Coxall turned in his weapon on December 20. The parties stipulated

that Respondent did not contact the Union prior to its request that the two security guards return their weapons.

### B. *Discussion*

#### 1. Applicable legal principles

An employer violates Section 8(a)(1) and (5) of the Act when it evades its duty to bargain by making unilateral changes in wages, hours, or other terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). However, not every unilateral change constitutes a breech of the bargaining obligation. The change must amount to ''a material, substantial and a signigicant'' one. *Peerless Food Products*, 236 NLRB 161 (1978); *Murphy Oil USA*, 286 NLRB 1039, 1041 (1987). See generally *San Antonio Portland Cement Co*., 277 NLRB 309, 313 (1985).

#### 2. Recall of weapons

The complaint alleges that by requesting Clark and Coxall to return their weapons without prior notice to the Union, Respondent unilaterally changed a term and condition of employment, in violation of Section 8(a)(1) and (5) of the Act. In a thoughtful and well-written brief, counsel for the General Counsel contends, citing *United Technologies Corp*., 286 NLRB 693, 694 fn. 1 (1987), that a weapon constitutes part of the guard's ''uniform'' and, therefore, any unilateral change without bargaining with the Union with respect to uniforms violates the Act. I believe, however, that General Counsel's argument is misplaced. The term ''uniform'' normally connotes articles of clothing. In *United Technologies Corp*., supra, the uniforms consisted of pants, shirts, and jackets. General Counsel has cited no case which indicates that a gun is considered as part of a ''uniform.'' Indeed, the job description for the position of security guard at Respondent, which was introduced as an exhibit by General Counsel, states only the following under the category of ''uniforms'': ''Grey slacks, blue blazer, black shoes and socks, white or light blue shirt, appropriate tie. Guard patch or badge will be worn on left breast pocket in addition to nameplate.'' The requirement to carry a weapon is stated under a separate category of ''special requirements,'' which provides that ''firearms must be concealed at at all times beneath jacket.'' When asked how he carried his weapon, Clark testified that he carried it in a shoulder holster under his coat. He further testified, ''I kept on my jacket at all times.''

General Counsel also contends that whether or not guards are armed has ''substantial implications for their wages.'' Curtis Trueheart, the Union's business representative, testified that in the industry, armed guards normally receive higher salaries than unarmed guards. However, there is no indication in the record that this would be the case with respect to Respondent. To the contrary, counsel for Respondent argued at the hearing that a relief guard at Respondent's facility who was unarmed was paid at a higher salary than were the armed guards. There is no indication in the record that the duties of Clark and Coxall changed in any respect after their guns were removed.

General Counsel also argues that decisions which impact on employee safety are subjects about which parties are obliged to bargain. However, in her brief, General Counsel concedes that ''there is no evidence in the record that the guards in this case were in fact safer for being armed.'' The record indicates that access to Respondent's facility is through the entrance of Shomberg Plaza, where Shomberg Plaza security guards are stationed. Indeed, Respondent contacted the police department to survey its security needs and Abdullah credibly testified that they were informed by the police that, while the police could not tell them whether their guards should be armed or unarmed, ''given the nature of the security of Northside Center the preference was that they were not armed.''

#### Conclusions

I conclude that General Counsel has not shown that Respondent, by recalling the guns carried by Clark and Coxall, evaded its duty to bargain. After Respondent perceived that it was having problems with one of its guards because he carried a weapon, in view of the fact that Respondent's security needs were being adequately met and in view of the police department's preference that its guards not be armed, on December 19 Respondent requested that the two security guards return their weapons. There has been no showing that the duties of the two employees were changed in any way. In addition, there has been no showing that the wages of the two employees were reduced. While General Counsel contends that in the future the wages may be reduced because the guards no longer carry weapons, as stated in *Peerless Food Products*, supra, 236 NLRB 161 ''not every unilateral change . . . constitutes a breach of the bargaining obligation. The change unilaterally imposed must, initially, amount to 'a material, substantial, and a significant' one . . . .'' With respect to wages, no change was made. While there may be a change in the future, such a change is merely speculative. Accordingly, the allegation is dismissed.

### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practice alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]